

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 19, 2007

BRYAN C. HESTER v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Davidson County
No. 2000-D-2033 Steve Dozier, Judge**

No. M2006-01887-CCA-R3-PC - Filed September 4, 2007

A Davidson County Criminal Court jury convicted the petitioner, Bryan C. Hester, of second degree murder, and the trial court sentenced him as a Range I, violent offender to twenty-five years in confinement. This court affirmed the petitioner's conviction and sentence. See State v. Bryan Christopher Hester, No. M2003-00503-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 436 (Nashville, May 12, 2004), perm. to appeal denied, (Tenn. 2004). Subsequently, the petitioner filed a petition for post-conviction relief, and the post-conviction court denied the petition after an evidentiary hearing. On appeal, the petitioner contends that he received the ineffective assistance of counsel because his trial attorney (1) failed to request a jury instruction on causation; (2) failed to include a pretrial motion hearing transcript in the direct appeal record, precluding this court's review of the trial court's denial of the motion; and (3) failed to prepare for trial adequately because counsel failed to obtain the victim's medical records earlier. Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Dwight E. Scott, Nashville, Tennessee, for the appellant, Bryan C. Hester.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy H. Eisenbeck and Pamela Sue Anderson, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The proof at trial revealed, in pertinent part, that on the morning of September 17, 2000, the petitioner's father called the police to the petitioner's apartment for a "suicide call." Hester, No.

M2003-00503-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 436, at *2. When an officer arrived at the scene, he went into the apartment and found the naked and deceased victim lying in the bathtub. Id. at **2-3. The victim's clothes were in a pile on the bathroom floor, a .22 caliber rifle was leaning against the bathroom wall, and a bow saw was in the bathroom. Id. at *3. The petitioner, his girlfriend, and his father were present. Id. at **3-4. The victim had been living with the petitioner, and the petitioner told a detective that the petitioner had held a small party in the apartment the previous night. Id. at **5-6. After the petitioner's friends left the party, he and the victim got into an argument. Id. at *6. They beat each other with sticks, and the victim went into the bathroom. Id. The petitioner went into the bathroom, saw the victim lying in the bathtub with a rifle barrel in his mouth, and saw the victim shoot himself. Id.

A detective collected wooden sticks that looked like table legs or broom handles from the apartment. Id. at *4. During a formal interview, the petitioner gave another statement. Id. at *7. He told police that during his fight with the victim, he hit the victim in the chest with a stick. Id. After the fight, the victim went into the bathroom, and the petitioner went into the bathroom to apologize. Id. The petitioner found the victim lying in the tub, and the victim shot himself. Id. At first, the petitioner stated that the victim had been clothed at the time of the shooting. Id. However, he later admitted that he cut the victim's clothes off after the victim committed suicide. Id. at *8.

Dr. Bruce Levy, who performed the victim's autopsy, testified that the victim had a gunshot wound in his right thigh and a fatal gunshot wound in the roof of his mouth. Id. at *10. Dr. Levy visually inspected the victim's mouth and stuck a gloved hand in the mouth. Id. at *13. He found no soot or gunpowder residue in the victim's mouth or on the victim's blue jeans, indicating that the rifle barrel was at least two feet away from the victim when it was fired. Id. *10. Dr. Levy also stated that the victim had no damage to his teeth, indicating that his mouth was open when he was shot. Id. Given the lack of damage to the victim's mouth, Dr. Levy characterized the oral gunshot wound as a "perfect shot or lucky shot." Id. at *13. Dr. Levy found patterned bruises on the victim's body and concluded that the bruises were made by the victim's having been beaten with sticks, including a stick that had a metal screw inserted in one end. Id. at *11. He ruled that the manner of death was a homicide. Id. at *12.

Dr. David McElroy, an expert in forensic psychology, testified for the defense that he reviewed the victim's medical records and that the victim had been treated for substance abuse, diagnosed at Vanderbilt with major depressive disorder, prescribed an antidepressant, and was a high suicide risk. Id. at **22-23. Although the petitioner had been charged with first degree premeditated murder, the jury convicted him of second degree murder. Id. at *24.

____ After this court affirmed the petitioner's conviction and sentence and the supreme court denied his application for permission to appeal, the petitioner filed a timely petition for post-conviction relief, claiming that he received the ineffective assistance of trial counsel. The post-conviction court appointed counsel, and counsel amended the petition.

At the evidentiary hearing, the petitioner's trial attorney testified that he had been licensed to practice law in Tennessee since 1997, that sixty percent of his law practice involved criminal law, and that he was retained to represent the petitioner. Although the petitioner's case was not counsel's first premeditated murder case, it was the first to go to trial. The defense's theory of the case was that the victim committed suicide. To prepare, counsel read books on forensic pathology and gunshot wounds and spent two or three afternoons speaking with Dr. Levy. Trial counsel also hired Dr. Cleland Blake, a forensic pathologist, to review Dr. Levy's autopsy report. Dr. Blake believed that Dr. Levy should have excised a portion of the victim's palate and used a dissecting microscope to look for soot or gunpowder residue in the victim's mouth. However, Dr. Blake ended up not testifying for the defense because he concluded that the petitioner "should plead guilty and pray for . . . mercy."

Counsel testified that on the Friday before the petitioner's Monday trial, the State met with counsel and informed him that the State had just learned about the victim's Vanderbilt medical records, which stated the victim had suicidal tendencies. On Monday, the first day of trial, counsel received the medical records and filed a motion to continue. However, the trial court denied the motion that same day, and counsel gave the medical records to Dr. McElroy for him to review before his testimony on Wednesday. Although Dr. McElroy was only able to review a "limited portion" of the records, counsel acknowledged that Dr. McElroy informed the jury about the victim's potential for suicide and that the jury had ample proof that the victim possibly committed suicide. Counsel represented the petitioner in his direct appeal of his conviction and raised the trial court's denial of the motion to continue as reversible error. However, counsel said he did not file the motion hearing transcript with the appellate record because he believed an affidavit was sufficient to protect the record. Counsel stated that if the trial court had granted the motion to continue, "some issues could have been further investigated and fleshed out," and counsel and Dr. McElroy could have more thoroughly reviewed the victim's mental health records. Counsel stated that despite the trial court's denial of the motion, he was prepared to try the case.

Counsel testified that he did not believe causation was an issue in this case because a bullet caused the victim's death, and he acknowledged that he did not request a causation instruction. He stated that the issues in the case were whether the petitioner shot the victim and premeditated the victim's death. Counsel met with the petitioner numerous times before trial, and they discussed the petitioner's possible cross-examination testimony.

On cross-examination, counsel testified that he had a subpoena issued for the victim's medical records as soon as he learned about them. At first, counsel believed the petitioner's story that he was innocent and that the victim committed suicide. However, at some point, counsel received a letter from the petitioner in which the petitioner stated that he wished he had been more honest with counsel. Counsel stated that in the letter, the petitioner "kind of" admitted his culpability in the case. On redirect examination, counsel acknowledged that the petitioner only admitted in the letter that he shot the victim in the thigh. Up until that time, however, the petitioner had denied any responsibility for the shooting.

The petitioner testified that he, his father, and trial counsel met a couple of times in counsel's office before trial but that "[t]here was never any real one-on-one, long discussions that we had together at all." After the petitioner was put in jail, counsel and the petitioner also met a couple of times for a few minutes. Counsel never outlined the petitioner's cross-examination testimony. The petitioner had wanted to testify at trial but was not prepared and decided not to testify. The petitioner stated that at the time of the shooting, he was mad at the victim and may have threatened to kill him. The victim was lying in the bathtub and told the petitioner, "Let me make my own peace with God." The petitioner gave the rifle to the victim, and the victim shot himself. The petitioner had planned to dismember the victim's body and hide it because he did not believe there was any way he could explain the victim's death. The petitioner lied to counsel about not shooting the victim in the leg. He stated that he did not know why he shot the victim in the leg and had no explanation for that. The petitioner did not telephone the police after the shooting because he was afraid and panicked.

On cross-examination, the petitioner testified that he and the victim fought and that he hit the victim with a table leg that had a screw inserted in the end of it. At first, the petitioner said that he also hit the victim many times with a broom handle. However, he later stated that he did not hit the victim with a broom handle. He acknowledged that he walked the victim to the bathroom at gunpoint and that the victim was clothed at the time of the shooting. After the shooting, the petitioner cut off the victim's clothes with scissors. The petitioner acknowledged that he lied to trial counsel and the police about some of the facts in the case and that he also may have lied to the jury if he had testified. However, he maintained that he did not shoot the victim in the mouth. He acknowledged that after he was incarcerated, his father smuggled drugs to him. As a result, the petitioner was convicted of attempting to bring drugs into a penal institution.

II. Analysis

According to the petitioner's brief, he contends that he is entitled to post-conviction relief because trial counsel failed to request a jury instruction on causation; failed to include the transcript of the hearing on his motion to continue in the direct appeal record, which precluded this court from reviewing the issue; and failed to obtain the victim's medical records earlier, which would have allowed the defense to prepare adequately for trial. In a written order, the post-conviction court denied relief. As to the petitioner's claim regarding the lack of a jury instruction on causation, the post-conviction court stated that "trial counsel thoroughly investigated the issue on causation and believed the better and more rational strategy was to attack the findings of the State's medical witnesses." Regarding the petitioner's claim that counsel should have obtained the victim's medical records earlier, the post-conviction court concluded that the petitioner had failed to demonstrate prejudice because counsel "was well aware of the behavioral issues of the victim and aggressively pursued that line of inquiry." The court did not address the petitioner's argument that counsel was ineffective for failing to include the transcript of the motion hearing in the direct appeal record.

To be successful in a claim for post-conviction relief, the petitioner must prove all factual allegations contained in the post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). "Clear and convincing evidence means evidence in which there is no

serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court’s findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court’s findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court’s conclusions of law purely de novo. Id.

“To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel’s performance was deficient and that the deficiency prejudiced the defense.” Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel’s performance was within the range of competence required of attorneys in criminal cases. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

A. Causation Instruction

A defendant has a “constitutional right to a correct and complete charge of the law.” State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). Therefore, trial courts “should give a requested instruction if it is supported by the evidence, embodies a party’s theory, and is a correct statement of the law.” State v. Phipps, 883 S.W.2d 138, 150 n.20 (Tenn. Crim. App. 1994). Tennessee Pattern Jury Instruction 42.14 provides the following instruction, in relevant part, on causation:

Before the defendant can be convicted of any degree of homicide, the State must have proven beyond a reasonable doubt that the death of the deceased was proximately caused by the criminal conduct of the defendant The proximate cause of death is that cause which, in natural and continuous sequence, unbroken by any independent intervening cause, produces the death and without which the death would not have occurred.

As noted in the petitioner’s brief, in State v. Farner, 66 S.W.3d 188, 206 (Tenn. 2001), our supreme court stated that “causation is an element of every homicide offense, and the jury should be so instructed.” However, the court also stated that “[i]n the vast majority of cases, causation is not disputed, so omitting this instruction would be considered harmless error.” Id.

The State contends that causation was not an issue in this case. We agree. It is undisputed that the cause of the victim's death was a gunshot wound to the roof of the victim's mouth. The main issue was whether the victim committed suicide or the petitioner shot the victim. Given that the petitioner's defense was that he was not the perpetrator of the crime, the lack of a causation instruction was harmless error in this case. Thus, the petitioner has failed to demonstrate that he was prejudiced by counsel's failure to request a causation instruction.

B. Motion Hearing Transcript

As his second issue, the petitioner contends that he received the ineffective assistance of counsel because his trial attorney failed to include a transcript of the hearing on his motion to continue in the direct appeal record, precluding this court from considering the issue. We note that although the post-conviction court failed to address the issue in its order, we can determine that it does not warrant post-conviction relief.

The petitioner believes he was prejudiced by counsel's failure because a continuance was warranted in this case so that counsel and his expert witness could adequately review the victim's medical records. However, the petitioner also has failed to include the transcript in the post-conviction appellate record. Without the transcript, we cannot determine whether the trial court properly denied the petitioner's motion to continue. Moreover, even if we assume that the trial court erred by refusing to grant the petitioner's motion, the petitioner once again has not demonstrated prejudice because he has not explained how any of the information in the medical records would have changed the outcome of his case. Finally, the petitioner also has not shown prejudice because trial counsel testified that Dr. McElroy had two days to review the victim's medical records, that counsel was ready for trial despite the trial court's denial of the motion, and that the jury heard about the victim's suicidal tendencies. The petitioner has included the trial transcript in the post-conviction record, and our review of the transcript supports counsel's testimony that the jury heard ample testimony about the victim's mental health history and potential for suicide. Therefore, the petitioner has failed to show that he received the ineffective assistance of counsel.

C. Failure to Obtain Medical Records Earlier

Finally, the petitioner contends that he received the ineffective assistance of counsel because his trial attorney failed to acquire the victim's medical records earlier, which prohibited counsel from preparing for trial adequately. As noted in the petitioner's brief, in denying the petitioner's motion for new trial, the trial court stated that the State had turned over the medical records during discovery. We note that this contradicts trial counsel's evidentiary hearing testimony in which he said that the State did not inform him of the documents until the Friday before the Monday trial. In any event, regardless of when trial counsel obtained the documents, the petitioner has not demonstrated prejudice because he has failed to show how any of the information in the documents would have changed the outcome of his case. Thus, he is not entitled to post-conviction relief.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

NORMA McGEE OGLE, JUDGE